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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 TEAIRA SHORTER,

8 Plaintiff,

9 v.

10 THE CITY OF LAS VEGAS, et al.,

11 Defendants.

Case No. 2:16-cv-00971-KJD-CWH

ORDER

12 Before the Court is Plaintiff Teaira Shorter's motion to amend or correct the Court's
13 order on Defendants' motion for summary judgment (#81). Defendant Correct Care Solutions
14 responded (#83), and Shorter replied (#84).

15 **I. Background**

16 This case stems from the medical treatment Shorter received while detained at the Las
17 Vegas Detention Center in May 2014. During her detention, Shorter's appendix ruptured.
18 Although she complained of symptoms consistent with appendicitis—persistent abdominal pain,
19 nausea, and vomiting—prison officials did not immediately transfer her to the hospital and opted
20 instead to treat her in-house. Unfortunately, by the time officials decided to transfer Shorter to
21 the hospital, her condition had deteriorated to the point that doctors were unable to safely operate
22 to remove her appendix. This resulted in a lengthy hospital stay before and after her
23 appendectomy procedure. In April 2016, Shorter brought this suit against the Cities of Las
24 Vegas, North Las Vegas, and various other defendants, including: Correct Care Solutions who is
25 the contracted medical services provider to the Las Vegas Detention Center, two Correct Care
26 nurses, Ifeanyi Madu and Joe Halpin, and Michelle Freeman in her official capacity as Director
27 of the Las Vegas Detention Center. Shorter alleged (1) that each defendant was deliberately
28 indifferent to her serious medical needs, which violated her Eighth and Fourteenth Amendment

1 rights; (2) that each defendant negligently failed to provide medical care to her while in custody;
2 and (3) that NRS 211.140(4) imposes a statutory duty of care upon each defendant to provide
3 adequate health care, which the defendants breached. On October 25, 2018, Correct Care and
4 nurses Madu and Halpin, moved for summary judgment on each of Shorter's claims. The
5 remaining defendants joined that motion on Shorter's negligence per se claim but did not
6 challenge her § 1983 or negligence claims.

7 On September 28, 2018, the Court granted summary judgment in part and ordered
8 supplemental briefing on the deliberate indifference standard for individual defendants Madu and
9 Halpin that is set out in Gordon v. Cnty. of Orange, 888 F.3d 1118, 1124–25 (9th Cir. 2018). As
10 to Shorter's § 1983 claim against Correct Care, the Court denied summary judgment finding a
11 genuine issue of material fact whether Correct Care failed to implement policies or procedures to
12 prevent deliberate indifference to her medical needs or in the alternative failed to follow those
13 policies. As to Shorter's negligence claim against Correct Care and nurses Madu and Halpin, the
14 Court found that Shorter's claim was one for medical malpractice and thereby required an expert
15 affidavit at the time of filing. Because Shorter's complaint lacked that affidavit, the Court
16 dismissed her claim without prejudice. Finally, the Court granted summary judgment on
17 Shorter's negligence per se claim as to each defendant finding that NRS 211.140(4) does not
18 impose a duty on any of the named defendants. Shorter now moves to alter or amend the Court's
19 order on her negligence and negligence per se claims. Correct Care and nurses Madu and Halpin
20 have responded in opposition.

21 **II. Legal Standard**

22 Rule 59 allows a party to seek alteration or amendment of a judgment within 28 days of
23 its entry. These motions are generally disfavored and should not be granted absent "highly
24 unusual circumstances." Kona Enters., Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir.
25 2000); LR 59-1(b). While there is no particular test for reconsideration, the following factors
26 guide the Court's analysis: (1) the Court has received evidence not previously available; (2) the
27 Court determines it committed clear error making its prior decision "manifestly unjust;" or (3)
28 the Court discovers an intervening change in controlling law. School Dist. No. 1J v. ACandS,

1 Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). In considering such a motion, the Court is cognizant of
2 the interests of finality of judgment and conservation of judicial resources. Carrol v. Nakatani,
3 342 F.3d 934, 945 (9th Cir. 2003). This is a remedy that should be used sparingly and is not a
4 vehicle to raise arguments that a party could reasonably have raised earlier. Kona Enters., Inc.,
5 229 F.3d at 890.

6 **III. Analysis**

7 Shorter asks the Court to amend two of its holdings and find the following: (1) that NRS
8 41A.071 did not require Shorter to file an expert affidavit with her initial complaint because
9 Correct Care Solutions is not a “provider of healthcare” under the statute and (2) that NRS
10 211.140(4), which requires the cities of Las Vegas and North Las Vegas to provide medical care
11 to detainees, imposed a duty on at least one defendant. The Court evaluates Shorter’s claims in
12 order.

13 **A. NRS 41A.071 Required Shorter to File an Expert Affidavit with her First 14 Complaint Because It Alleges Professional Negligence**

15 The gist of Shorter’s new argument is that her claims cannot be subject to 41A.071’s
16 affidavit requirement because the statute only applies to “provider[s] of health care” and Correct
17 Care is not a “provider of health care” under NRS 41A.015. Because Correct Care is not a health
18 care provider under NRS 41A.017, she continues, her claims were not professional negligence
claims and dismissal was improper.

19 In Nevada, a complaint for professional negligence must be filed with an expert affidavit
20 that supports the allegations of the complaint. NRS 41A.071. A party’s failure to submit the
21 affidavit requires dismissal without prejudice. The statute is clear; the “district court *shall*
22 dismiss” the complaint if it is not accompanied by the affidavit at the time it is filed. NRS
23 41A.071 (emphasis added). The purpose of the statute is to protect medical professionals from
24 frivolous lawsuits and promote the practice of medicine in Nevada. See Fierle v. Perez, 219 P.3d
25 906, 908 (Nev. 2009). Thus, if an action is for professional negligence, it must be accompanied
26 by an expert affidavit or it must be dismissed. The Court’s original order acknowledges this.
27 Referring to Shorter’s complaint, the Court stated, “if this is a professional negligence action that
28 was filed without an affidavit, the Court must dismiss it.” ECF No. 80, at 8.

1 The question then is whether Shorter’s complaint alleges a claim for professional
2 negligence against Correct Care and nurses Madu and Halpin. NRS 41A.015 defines professional
3 negligence as the failure of a “provider of health care . . . to use the reasonable care, skill or
4 knowledge ordinarily used under similar circumstances by similarly trained and experienced
5 providers of health care.” Whether an entity is a “provider of health care” is defined in NRS
6 41A.017, which lists various medical professionals. It reads:

7 “Provider of health care” means a physician licensed pursuant to chapter 630 or
8 633 of NRS, physician assistant, dentist, licensed nurse, dispensing optician,
9 optometrist, registered physical therapist, podiatric physician, licensed
10 psychologist, chiropractor, doctor of Oriental medicine, medical laboratory
11 director or technician, licensed dietitian or licensed hospital, clinic, surgery
center, physicians’ professional corporation or group practice that employs any
such person and its employees.

12 NRS 41A.017.

13 Shorter contends that the Court misinterpreted NRS 41A.017 when it determined that
14 Correct Care is a group practice under the statute. She points to the syntax of the statute and the
15 characteristics of Correct Care’s corporate structure to demonstrate that it is not a “group
16 practice.” The statute’s last listed entities are “physicians’ professional corporation or group
17 practice that employs any [listed] person.” Shorter points out that the text does not separate the
18 terms “physicians’ professional corporation” and “group practice” with a comma. She argues
19 that the missing comma limits groups practices to a *physician’s* group practice or “group
20 practices owned by physicians.” ECF No. 81, at 7. Correct Care, she claims, cannot be a
21 physician’s group practice because its corporate leadership consists of “business people, not
22 practitioners of health care.” *Id.* at 10. In fact, “only three (3) individuals out of sixteen (16)
23 individuals comprising of [Correct Care’s] leadership are trained and licensed as medical
24 practitioners.” *Id.* at 9. It follows, she claims, that because Correct Care is not a provider of
25 health care under the statute, it “should not be able to shield itself from liability of its own
26 negligence by characterizing itself as a physicians’ group practice.” *Id.* at 10.

27 However, merely classifying Correct Care as a health care provider does not shield it
28 from liability as Shorter argues. On the contrary. The statute does not affect Correct Care’s

1 liability one way or the other. Regardless of 41A.071's affidavit requirement, Correct Care may
2 still be sued for professional and general negligence. The statute only requires that a party
3 asserting a professional negligence claim against Correct Care to submit an expert affidavit
4 supporting its claim.

5 Further, accepting Shorter's interpretation of the statute would lead to absurd results and
6 would be inconsistent with the Nevada Supreme Court's interpretation of NRS 41A.017. First, if
7 the term "health care provider" were limited to group practices operated exclusively by doctors,
8 the statute would exclude nearly every hospital in Southern Nevada because their boards are run
9 by "business people, not practitioners of healthcare."¹ Shorter's interpretation of NRS 41A.017
10 also conflicts with the Nevada Supreme Court's interpretation of whether a plaintiff's claim is
11 one for professional negligence. At bottom, the point of NRS 41A.071 is to require preliminary
12 support for malpractice claims against medical professionals. To determine whether a complaint
13 is for professional negligence the Nevada Supreme Court looks at the underlying allegations in
14 the complaint. It gives the following guidance: the Court "must determine whether [the] claims
15 involve a medical diagnosis, judgment, or treatment or are based on [the] performance of
16 medical services." Szymborski v. Spring Mtn. Treatment Ctr., 403 P.3d 1280, 1284 (Nev. 2017);
17 DeBoer v. Sr. Bridges of Sparks Fam. Hosp., 282 P.3d 727, 731 (Nev. 2012). Thus, if the
18 plaintiff's allegations boil down to deficiencies in the defendant's medical diagnosis, judgment,
19 or treatment the claim is for professional negligence. Id.

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21 ¹ For instance, multiple hospitals in southern Nevada would not qualify as providers of health care under
22 Shorter's interpretation of the statute because their executives are not practicing physicians. For instance, Valley
23 Health System would not qualify as a provider of health care under Shorter's interpretation of NRS 41A.017. Even
24 though Valley Health System advertises itself as a "healthcare management company" and operates multiple
25 hospitals in the Las Vegas valley, its CEO is not a licensed practitioner. See Valley Hospital Names Claude Wise as
26 Chief Executive Officer (Aug. 24, 2018), [https://www.valleyhospital.net/about/news/valley-hospital-names-claude-](https://www.valleyhospital.net/about/news/valley-hospital-names-claude-wise-as-chief-executive-officer)
27 [wise-as-chief-executive-officer](https://www.valleyhospital.net/about/news/valley-hospital-names-claude-wise-as-chief-executive-officer) (CEO Claude Wise "earned both his Master of Business Administration and Master
28 of Health Administration from Georgia State University"). Likewise, University Medical Center would not qualify
as a provider of health care under Shorter's interpretation. See Bio on Mason Van Houweling, CEO Univ. Med. Ctr.
of S. Nev., https://www.uab.edu/shp/hsa/images/2018-Symposium/Bio_-_Mason_VanHouweling.pdf (last visited
Dec. 20, 2018) ("Mason earned a Master of Science in Health Services Administration from University of Central
Florida . . . he also obtained a Bachelor of Science in Health Services Administration from University of Central
Florida"). Finally, Dignity Health, which owns and operates the St. Rose network of hospitals, would not qualify as
a provider of health care under Shorter's interpretation. See Theresa Conley Named President/CEO,
<https://www.dignityhealth.org/las-vegas/about-us/press/press-center/teressa-conley-named-president-ceo> (last
visited Dec. 20, 2018) (Ms. Conley "holds . . . a master's degree in critical care nursing, a Master of Business
Administration and a doctorate in public administration").

1 In Szymborski, the Nevada Supreme Court faced a similar question as the one presented
2 here. Specifically, whether a negligence claim against a hospital was in fact a medical
3 malpractice claim thereby triggering 41A.071's affidavit requirement. Admittedly, the line
4 between general negligence—which does not require affidavit—and medical malpractice—
5 which does—is not always clear. Id. at 1285. The Court must look to the gravamen or
6 “substantial point or essence” of a claim to determine whether it is a claim for professional
7 negligence and thereby subject to the requirements of NRS 41A.071. Id. Claims that are
8 “substantially related” to medical treatment or claims that require expert testimony to determine
9 the appropriate standard of care qualify as medical malpractice claims. Id. at 1284–85 (citing
10 Gunter v. Lab. Corp. of Am., 121 S.W.3d 636, 640 (Tenn. 2003); Bryant v. Oakpointe Villa
11 Nursing Centre, 684 N.W.2d 864, 872 (Mich. 2004)).

12 Shorter's entire claim against Correct Care arises out of the treatment, diagnosis, and care
13 provided by nurses Madu and Halpin. Her complaint makes this clear. There, she claims Correct
14 Care “had a duty of reasonable care toward [Shorter] to *provide adequate and/or necessary*
15 *medical care . . . while Shorter was in [Correct Care's] custody.*” ECF No. 32, at 12 (emphasis
16 added). She continued, Correct Care and nurses Madu and Halpin “breached their duty when
17 they *failed to provide adequate and/or necessary medical care* to Shorter.” Id. (emphasis added).
18 The gravamen or “substantial point or essence” of Shorter's claim against Correct Care is that its
19 failure to diagnose her appendicitis and adequately treat her condition fell below the acceptable
20 standard of care. Additionally, if Shorter's negligence claim were to proceed, it is likely that she
21 would have to utilize expert testimony to establish the appropriate standard of care for the nurses
22 who treated her while detained. See Staccato v. Valley Hosp., 170 P.3d 503, 506 (Nev. 2007)
23 (“generally, a plaintiff must present expert medical testimony to establish medical malpractice”).
24 And so, Shorter's negligence claim against Correct Care and nurses Madu and Halpin is in fact a
25 claim for medical malpractice subject to NRS 41A.071.

26 Other courts have reached the same conclusion. In O'Neal v. Las Vegas Metro. Police
27 Dept., the Court evaluated whether a pretrial detainee's claims against Naphcare—a private
28 corporation that contracts with Clark County to provide medical services to Clark County

1 inmates—was subject to the affidavit requirement in NRS 41A.071. No. 2:17-cv-02765-APG-
2 GWF, 2018 WL 4088002 (D. Nev. Aug. 27, 2018). There, an inmate injured his shoulder
3 climbing down from his top bunk. Id. at *2. He claimed that Naphcare negligently failed to
4 provide him care for the injury and refused to prescribe him the necessary medication to treat the
5 injury. Id. Like Shorter’s suit against Correct Care, O’Neal sued Naphcare under theories of
6 § 1983 liability and negligence. Like Shorter, O’Neal failed to file an expert affidavit according
7 to NRS 41A.071. Naphcare, like Correct Care, moved to dismiss O’Neal’s claims citing the
8 41A.071’s affidavit requirement. Id. It argued that O’Neal’s failure to file the affidavit required
9 dismissal. The Court agreed. It found that the substance of O’Neal’s complaint was “based in
10 medical treatment or judgment” provided by Naphcare. Id. at *3. As a result, the Court dismissed
11 O’Neal’s complaint. Id.

12 Likewise, Shorter’s claims arise out of the care, diagnosis, and medical judgment of
13 nurses Madu and Halpin. She alleges that they failed to diagnose her appendicitis and that her
14 treatment fell short of the standard of care. Shorter’s complaint alleges a claim for professional
15 negligence, which triggers the affidavit requirement of NRS 41A.071. Therefore, the Court
16 refuses to reconsider dismissal of her claim.

17 **B. NRS 211.140(4) does Not Impose a Duty on these Defendants nor does it Create**
18 **a Private Right of Action**

19 Next, Shorter argues that NRS 211.140(4) imposes a duty of care on at least one
20 defendant: Michele Freeman in her official capacity as Director of the City of Las Vegas
21 Detention Center. NRS 211.140(4) compels Nevada cities and townships to provide a program
22 for health care services to incarcerated people. It states, “The sheriff, chief of police or town
23 marshal shall arrange for the administration of medical care required by prisoners while in his or
24 her custody.” NRS 211.140(4). It also provides that the city shall pay the cost of such services.
25 Id.

26 Shorter asks that the Court amend its order to find that NRS 211.140(4) imposed a
27 statutory duty of care on at least one defendant: Michele Freeman. Freeman is the Director of the
28 Las Vegas Detention Center and Chief of the Las Vegas Department of Public Safety. Part of her
responsibilities as Director of the Detention Center and Chief of the Public Safety Department is

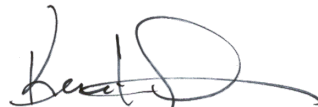
1 to oversee city detention centers. Shorter argues that Freeman's duty to oversee detention centers
2 imposes upon her the duty to "arrange for the administration of medical care" to inmates. She
3 also argues that Freeman, as the Chief of the Department of Public Safety, is the public official
4 that 211.140(4) intends to direct. As a result, Shorter claims that she may at least sue Freeman
5 under a theory of negligence per se under NRS 211.140(4).

6 If the legislature intended to make the Chief of the Department of Public Safety liable
7 under 211.140(4), it would have said so. Absent from the statute, however, is any indication that
8 it imposes a duty on anyone but the chief of police, sheriff, or town marshal. And the fact that
9 Freeman has "chief" in her title is not enough to extend to her that duty. Additionally, the statute
10 does not impose a minimum standard of care or govern the quality of its health care program. In
11 fact, there is no indication that the statute requires anything more than providing the program.
12 The city satisfied this duty when it contracted with Correct Care to arrange for the administration
13 of medical care for inmates. Therefore, the Court denies Shorter's motion to alter or amend its
14 judgment on her claim for negligence per se.

15 **IV. Conclusion**

16 Accordingly, **IT IS HEREBY ORDERED** that Plaintiff's Motion to Amend/Correct
17 Order on Defendant's Motion for Summary Judgment (#81) is hereby **DENIED**.

18 Dated this 17th day of January, 2019.

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21 Kent J. Dawson
22 United States District Judge
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